APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7042—July Term, 1962

Filed United States Court of Appeals, Tenth Circuit
August 21, 1962

On Petition for Writ of Mandamus

Otto G. Lutes, Florence Lutes, B. B. French, Jewell French, L. O. Hood, Myrtle Hood, D. M. Brower, Mildred Brower, Carl R. Stalcup, Millie L. Stalcup, Ida F. Wray, E. F. Bruce, Geraldine Bruce, J. J. French, Thesia French, Riffe Wesley, Hazel Riffe, Ostby S. Austin, Ethel Austin, Jessie E. Brown, D. L. Hamilton, Helen Hamilton, Harry G. Riffe, Myrtle Riffe, G. F. Price, Flora Lee Price, Lewis B. Carpenter, Mary E. Carpenter, E. L. Carpenter and Blanche M. Carpenter, *Petitioners,*

v.

The United States District Court for the Western District of Oklahoma and The Honorable Stephen S. Chandler, Chief Judge of the United States District Court for the Western District of Oklahoma, *Respondents.*

Paul R. Kitch (Wayne Coulson, Dale M. Stucky, Robert T. Cornwell, Jerome F. Henry, Auburn G. Light, and James R. Yoxall were with him on the brief) for Petitioners.

Richard W. Fowler (Cochran, Dudley, Fowler, Rucks, Baker & Jopling, Of Counsel, were with him on the brief) for Respondents.

Before PHILLIPS, BREITENSTEIN and SETH, Circuit Judges.

BREITENSTEIN, Circuit Judge.

In this original mandamus proceeding we are asked to vacate a federal district court order staying further proceedings in 19 cases pending in that court until certain companion cases are decided in the Oklahoma state courts. The controversy is related to the situation presented to us in the group of cases reported as Rogers v. Westhoma Oil Company, 10 Cir., 291 F. 2d 726.

The petitioners here are, and the appellants-plaintiffs in Rogers v. Westhoma were, the lessors or successors of lessors of oil and gas leases covering lands in an established and productive field located in Seward County, Kansas, and Texas County, Oklahoma. Rogers v. Westhoma concerned Kansas lands and this litigation concerns Oklahoma lands. Except for differences in the names of the lessors and the descriptions of the land covered, the leases are identical in all pertinent provisions.

The claims presented in Rogers v. Westhoma and in these cases are that the leases had expired as to all horizons below sea level because of failure to obtain production within the primary terms. Of the 27 cases involved in Rogers v. Westhoma 24 were brought in Kansas state

courts and removed to federal court by Westhoma on the grounds of diversity while 3 were brought originally in federal court. We held in Rogers v. Westhoma that the leases had terminated as to all below-sea-level horizons.

Thereafter these suits involving Oklahoma lands were brought in the United States District Court for the Western District of Oklahoma against Westhoma and others asserting that the Oklahoma leases had terminated as to all below-sea-level horizons. After some, but not all, of these 19 cases were filed, Westhoma brought suits in the District Court of Texas County, Oklahoma, to quiet its title against the claim of termination. The state court suits presented leases identical, except for lessors and land descriptions, to those in the federal court. As there was no diversity the state court suits were not removable.

Westhoma applied to the federal court for an order staying the proceedings until the decision in the state court suits. The stay was granted and the petitioners seek by this mandamus proceeding to have it vacated.

The decision in Rogers v. Westhoma was based on the construction, interpretation, and application of the lease provisions under the Kansas rules pertaining to oil and gas leases. Westhoma concedes that the cases now under consideration, both federal and state, present the same fact situation and the same lease form as were presented in Rogers v. Westhoma; that the decision in Rogers v. Westhoma was not based on any Kansas statute or decision; that there is no Oklahoma statute requiring or justifying a different decision; and that the Kansas and Oklahoma rules of oil and gas lease construction do not differ in any pertinent regards.

Westhoma bluntly contends that the decision in Rogers v. Westhoma was wrong even under Kansas law and points out that the decision, from which there was a dissent, overruled a judgment entered by a federal judge who is now

a member of this court. The honest differences of opinion as to the construction of these unusual lease forms when applied to the peculiar facts admittedly existing may encourage, but do not justify, the forum-shopping which has occurred. The original Kansas cases were brought in state court and were removed by Westhoma to federal court. After our adverse decision Westhoma concluded that it would rather cast its lot with the state courts and when the petitioners herein brought suits in federal court in Oklahoma, Westhoma countered with non-removable state court suits and now says that such suits will determine the issues and bind the federal court as to leases covering Oklahoma land.

We have before us routine contract cases in which private parties disagree as to the effect of private contract provisions. The issues do not present any federal or state constitutional or statutory questions. No public officials or public agencies will be affected by the result. No hazard of a disturbance in the sensitive field of federal-state relationships is suggested. If we were to forego the exercise of the properly invoked diversity jurisdiction until state court decisions were obtained on identical contracts applying to identical facts, then the doctrine of abstention is extended far beyond any limits which have as yet been fixed by the Supreme Court of the United States and an easy method is afforded the district courts for the avoidance of decisions in difficult cases.

The principles applicable to abstention were canvassed in Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, and County of Allegheny v. Frank Mashuda Co., 360 U.S. 185. The Louisiana case held that a federal district court properly deferred proceedings in an eminent domain case until the state supreme court had been afforded an opportunity to interpret a questioned state statute. In the Allegheny County case the federal suit challenged the validity of an eminent domain taking. There

was pending at the time a state court suit to assess damages for the same taking. The trial court dismissed on the ground that a federal court should not interfere with an eminent domain proceeding brought under color of state law. The Supreme Court held to the contrary saying in substance that abdication of the obligation to adjudicate controversies properly before a federal court can be justified under the doctrine of abstention only in exceptional circumstances where the relegation of the parties to state court "would clearly serve an important countervailing interest."

In the situation here presented we do not have any question of the interpretation of a state statute and, hence, the reason for abstention present in the Louisiana case does not apply. In the Allegheny County case abstention was disapproved even though a federal court decision favorable to the landhowner would moot the state court proceedings to assess damage. The claim for abstention here asserted has even less substance.

There are no exceptional circumstances in the case at bar. The lower court actions, both federal and state, are between private parties and concern private contracts. Such run-of-the-mine litigation is ordinary and routine. The only question is whether abstention will "clearly serve an important countervailing interest."[1] The only countervailing interest suggested is that the parties are entitled in the first instance to have their controversy adjudicated in state court with the result that such state decision will bind the federal courts under the doctrine of Erie Railroad Co. v. Tompkins, 304 U.S. 64.

Recognition of the principle that in diversity actions a federal district court "is but another local forum and the right to recover is measured by the law of the state"[2] is

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[1] *County of Alleghany* v. *Frank Mashuda Co., supra*, p. 189.

[2] *Berger* v. *State Farm Mutual Automobile Insurance Company*, 10 Cir., 291 F.2d 666, 668.

not decisive of the issue here. The question is not the applicability of state law but of abstention by the federal court from action in cases where its jurisdiction is properly invoked.

In Thompson v. Magnolia Petroleum Co., 309 U.S. 478, the Supreme Court held that the ownership of oil underlying right-of-way lands of a railroad in reorganization under the Bankruptcy Act should be determined in state court action. The Supreme Court has been reluctant to expand the ruling in Thompson v. Magnolia. The later, and oft-quoted, decision in Meredith v. Winter Haven, 320 U.S. 228, 236, said:

> "Congress having adopted the policy of opening the federal courts to suitors in all diversity cases involving the jurisdictional amount, we can discern in its action no recognition of a policy which would exclude cases from the jurisdiction merely because they involve state law or because the law is uncertain or difficult to determine."

Markham v. Allen, 326 U.S. 490, held that a federal district court properly exercised its discretion in entertaining a suit by the Alien Property Custodian to determine his share in a decedent's estate in course of probate administration in a state court, even though the suit involved issues of state law. In Propper, Receiver, v. Clark, Attorney General, etc., 337 U.S. 472, another case involving the Alien Property Custodian, the court held that the federal court was not precluded from determining rights to property in the hands of a state court under a state receivership. Lumbermen's Mutual Casualty Co. v. Elbert, 348 U.S. 48, a case involving diversity jurisdiction and the Louisiana Direct Actions Statute, held that a federal court could not decline, as a matter of discretion, to exercise jurisdiction over an insurer alone even though the Louisiana standards of appellate review differed from the federal standards.

As we see the problem, the case at bar presents less reason for abstention than existed in any of the cases mentioned above. The state court cases involve different parties and res judicata will not apply. Neither our decision in Rogers v. Westhoma nor the state court decisions will assuredly control the federal cases which are now stayed. In Rogers v. Westhoma the defenses of estoppel and laches were waived. Counsel for Westhoma, appearing here for respondents, said in argument that in the Oklahoma cases, both state and federal, these defenses will be asserted. Further, Rogers v. Westhoma was presented on the basis that "occurrence of production on or off the leased premises included within a unit makes no difference in the disposition of the controversy"[3] and counsel tell us that in the Oklahoma cases this concession will not be made.

The possibility of a different result in the state cases from that in the federal cases creates no exceptional circumstance in which abstention will serve an important countervailing purpose. That possibility is weakened by the impossibility of assurance at this time that the cases will be decided on the same issues. Even though the possibility ripens into actuality the incongruity of conflicting decisions as to the Oklahoma lands is no more distasteful than would be the attainment of one result for the Kansas lands and another for the Oklahoma lands. Federal jurisdiction was properly invoked before the state cases were filed and we see no reason why the exercise of that jurisdiction should be stayed.

In our opinion the trial court abused its discretion in granting the stay order.[4] In such circumstances the writ

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[3] *Rogers* v. *Westhoma, supra,* p. 729.

[4] *United States* v. *Bureau of Internal Revenue of State of New Mexico,* 10 Cir., 291 F.2d 677, 679.

of mandamus lies to require the district court to proceed with and determine the actions pending before it.[5]

Leave to file the application for a writ of mandamus is granted. The response to that application thoroughly presents all pertinent issues and as the case has been briefed and argued on the merits the response to the application is taken as the response to a show-cause order. The writ is granted and the district court is directed to vacate its orders staying further proceedings in cases numbered 9410, 9411, 9412, 9413, 9414, 9415, 9419, 9421, 9431, 9435, 9446, 9448, 9453, 9489, 9494, 9504, 9512, 9513, and 9543 now pending on the docket of the United States District Court for the Western District of Oklahoma, and to proceed with and determine those cases.

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[5] *McClellan* v. *Carland*, 217 U.S. 268, 280; *In re President and Fellows of Harvard College*, 1 Cir., 149 F. 2d 69, 73. See also *LaBuy* v. *Howes Leather Co., Inc.*, 352 U.S. 249, 260.

APPENDIX B

Order of Judge Chandler

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

March 29, 1962

LIGHT & YOXALL
Liberal, Kansas

FLEENCE, GOOING, COULSON & KITCH
901 First National Bank Building
Wichita 2, Kansas

HENRY & HENRY
1356 First National Building
Oklahoma City, Oklahoma

COCHRAN, DUDLEY, FOWLER, RUCKS, BAKER & JOPLING
First National Building
Oklahoma City, Oklahoma

Re: Lutes et al v. Westhoma Oil Co. et al,
Civil Case Nos. 9410, 9411, 9412,
9413, 9414, 9415, 9419, 9421, 9431,
9435, 9446, 9448, 9453, 9489, 9490,
9494, 9503, 9504, 9505, 9512, 9513,
9525, 9543.

Gentlemen:

Upon consideration of defendants' motions to stay, I have come to the conclusion that under the doctrine of abstention and in the interest of comity between state and federal courts, I must exercise the discretion granted me by staying the proceedings in these cases until the question involved herein has been decided in the cases now pending in the courts of the State of Oklahoma, and decision thereon has become final. It is so ordered.

Very truly yours,

/s/ STEPHEN S. CHANDLER

APPENDIX C

Motion of Petitioner to Modify and Correct Opinion

(3 Attachments)

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

August 30, 1962

Filed United States Court of Appeals, Tenth Circuit

ON PETITION FOR WRIT OF MANDAMUS

OTTO G. LUTES, FLORENCE LUTES, B. B. FRENCH, JEWELL FRENCH, L. O. HOOD, MYRTLE HOOD, D. M. BROWER, MILDRED BROWER, CARL R. STALCUP, MILLIE L. STALCUP, IDA F. WRAY, E. F. BRUCE, GERALDINE BRUCE, J. J. FRENCH, THESIA FRENCH, RIFFE WESLEY, HAZEL RIFFE, OSTBY S. AUSTIN, ETHEL AUSTIN, JESSIE E. BROWN, D. L. HAMILTON, HELEN HAMILTON, HARRY G. RIFFE, MYRTLE RIFFE, G. F. PRICE, FLORA LEE PRICE, LEWIS B. CARPENTER, MARY E. CARPENTER, E. L. CARPENTER AND BLANCHE M. CARPENTER, *Petitioners,*

v.

THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA AND THE HONORABLE STEPHEN S. CHANDLER, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, *Respondents.*

MOTION

Respondents respectfully move the Court to modify one paragraph of the Court's opinion herein in order to correct a misunderstanding of the facts involved, and in order

that all of the relevant facts may be made a matter of record for consideration by the United States Supreme Court upon the petition for certiorari presently being prepared. The paragraph referred to, on pages 12 and 13 of the Court's opinion, is as follows:

> "As we see the problem, the case at bar presents less reason for abstention than existed in any of the cases mentioned above. The state court cases involve different parties and res judicata will not apply. Neither our decision in Rogers v. Westhoma nor the state court decisions will assuredly control the federal cases which are now stayed. In Rogers v. Westhoma the defenses of estoppel and laches were waived. Counsel for Westhoma, appearing here for respondents, said in argument that in the Oklahoma cases, both state and federal, these defenses will be asserted. Further, Rogers v. Westhoma was presented on the basis that 'occurrence of production on or off the leased premises included within a unit makes no difference in the disposition of the controversy' and counsel tell us that in the Oklahoma cases this concession will not be made."

The grounds of the motion are:

1. Counsel for Westhoma did not intend in argument to convey the impression that the defenses of estoppel and laches "will be asserted" in the state court cases, and such is not the fact. As appears from copies of the state court judgments attached hereto, the fact is that there is no issue of estoppel or laches in the state court cases. The *sole issue* therein is the *precise question* of law which was decided in *Rogers* v. *Westhoma* and is decisively involved in the federal court cases pending below.

2. The Court's words, "these defenses will be asserted" and "this concession will not be made", are believed to be susceptible of the inference that the state court cases are not yet at issue or have not yet been decided. The fact is, however, as shown by the attached copies, that the state

court cases were tried on March 22, 1962, and were decided in Westhoma's favor on June 13, 1962. This Court's record, as it now stands, does not reflect the state court decisions because they were not rendered until after the response was filed herein and because this Court, although advised thereof in oral argument, did not mention them in its opinion. It is believed that the state court decisions and the fact that appeals therefrom to the State Supreme Court are in process,[1] are relevant and important facts which should appear of record in order that the United States Supreme Court may be apprised thereof.

Wherefore, respondents move the Court to modify the opinion herein in such manner that the same will reflect the facts (1) that there are no issues of laches or estoppel in the state court cases, (2) that the state court cases were decided in Westhoma's favor on June 13, 1962, and (3) that appeals to the Oklahoma Supreme Court are being taken by the defendants therein.

The undersigned attorney hereby certifies that the attachments hereto are true and correct copies of the judgments and orders allowing appeals in two of the state court cases, as the same appear of record in the office of the Clerk of the District Court of Texas County, Oklahoma.

RICHARD W. FOWLER
1133 First National Building
Oklahoma City 2, Oklahoma
Attorney for Respondents

[1] The appeals were filed in the State Supreme Court on August 27, 1962.

APPENDIX C

(Attachment 1)

Journal Entry of Judgment
Westhoma v. Rist

IN THE DISTRICT COURT WITHIN AND FOR
TEXAS COUNTY, OKLAHOMA

No. 10,596

WESTHOMA OIL COMPANY, a corporation, *Plaintiff*

v.

B. C. RIST AND GLADYS RIST, *Defendants.*

Journal Entry of Judgment

This cause, pursuant to regular assignment, came on for trial on the 22nd day of March, 1962, all of the parties hereto appearing by their respective attorneys of record, all of whom announced ready for trial.

The parties submitted for the court's consideration a Stipulation of Facts, and thereupon the parties rested their respective cases, and the court took the decision of said cause under advisement.

Now, on this 13th day of June, 1962, the parties again appear by their respective attorneys of record; and the court, having considered said Stipulation of Facts and the briefs and arguments of the parties and being fully advised in the premises, finds the issues generally in favor of the plaintiff and against the defendants, and finds that the allegations of plaintiff's petition are true and correct and that judgment should be entered in accordance therewith.

It is therefore ORDERED, ADJUDGED AND DECREED by the court: that the plaintiff, Westhoma Oil Company, is the owner of a valid and subsisting oil and gas lease covering and affecting, among other lands, the following described property situated in Texas County, State of Oklahoma, to-wit:

> The Southeast Quarter (SE 1/4) of Section 2, Township 5 North, Range 18 ECM,

except as to those depths, horizons and strata which are situated above, and only above, sea level; that said oil and gas lease has been maintained, and presently is being maintained, in full force and effect on said lands described above with respect to all depths, horizons and strata therein and thereunder, both above and below sea level, by the continuing production of natural gas from a well located on lands heretofore pooled with said lands described above and producing from the Guymon-Hugoton pool at a depth wholly above sea level; that the interest of the defendants in and to the lands described above, with respect to all depths, horizons and strata therein and thereunder, both above and below sea level, is subject to all of the terms and provisions of said oil and gas lease, which is of record in Book 233 at Page 270 of the records of the County Clerk of Texas County, Oklahoma; that the claims of the defendants that said oil and gas lease has terminated as to all depths, horizons and strata below sea level are unfounded, invalid and without right, and that said claims constitute a cloud upon the said oil and gas leasehold title of the plaintiff as to all depths, horizons and strata below sea level underlying said lands above described; that the plaintiff's said oil and gas leasehold title is hereby quieted as against any and all claims of the defendants, and that the defendants, and all persons claiming by, through or under either or both of them, are hereby restrained and enjoined from asserting any right, title or interest in or to said lands above described adverse to the said oil and gas

leasehold title of the plaintiff; and that the plaintiff have judgment against the defendants for plaintiff's costs herein expended.

To all of the foregoing findings and the judgment of the court the defendants, and each of them, except, and their exceptions are allowed.

/s/ C. R. Board
District Judge

Approved as to Form:

/s/ Vincent Dale
Attorney for Plaintiff

/s/ Tryon, Sweet & Hensley
Attorney for Defendants

Filed July 2, 1962

Recorded in Book
42, Page 366

APPENDIX C

(Attachment 2)

Journal Entry of Judgment
Peerless Oil Co. v. Carpenter

IN THE DISTRICT COURT WITHIN AND FOR
TEXAS COUNTY, OKLAHOMA

No. 10,597

PEERLESS OIL AND GAS COMPANY, a Corporation, JAKE L. HAMON, and WESTHOMA OIL COMPANY, a Corporation, *Plaintiffs,*

vs.

ERNEST L. CARPENTER and BLANCH M. CARPENTER, *Defendants.*

JOURNAL ENTRY OF JUDGMENT

This cause, pursuant to regular assignment, came on for trial on the 22nd day of March, 1962, all of the parties hereto appearing by their respective attorneys of record, all of whom announced ready for trial.

The parties submitted for the Court's consideration a Stipulation of Facts, and thereupon the parties rested their respective cases, and the court took the decision of said cause under advisement.

Now, on this 13th day of June, 1962, the parties again appear by their respective attorneys of record; and the court, having considered said Stipulation of Facts and the briefs and arguments of the parties and being fully advised in the premises, finds the issues generally in favor of the plaintiffs and against the defendants, and finds that the allegations of plaintiffs' petition are true and correct and that judgment should be entered in accordance therewith.

It is therefore ORDERED, ADJUDGED AND DECREED by the court: That the plaintiffs, Peerless Oil & Gas Company and Jake L. Hamon, are the owners of a valid and subsisting oil and gas lease covering and affecting, among other lands, the following described property situated in Texas County, State of Oklahoma, to-wit:

The Northwest Quarter (NW/4) of Section 34, Township 6 North, Range 18 ECM,

except as to those depths, horizons and strata which are situated above, and only above, sea level, and that said oil and gas leasehold interest is subject to an overriding royalty interest therein owned by the plaintiff, Westhoma Oil Company; that said oil and gas lease has been maintained, and presently is being maintained, in full force and effect on said lands described above with respect to all depths, horizons and strata therein and thereunder, both above and below sea level, by the continuing production of natural gas from a well located on said lands described above and producing from the Guymon-Hugoton pool at a depth wholly above sea level; that the interest of the defendants in and to the lands described above, with respect to all depths, horizons and strata therein and thereunder, both above and below sea level, is subject to all of the terms and provisions of said oil and gas lease, which is of record in Book 233 at Page 322 of the records of the County Clerk of Texas County, Oklahoma; that the claims of the defendants that said oil and gas lease has terminated as to all depths, horizons and strata below sea level are unfounded, invalid and without right, and that said claims constitute a cloud upon the said oil and gas leasehold title of the plaintiffs as to all depths, horizons and strata below sea level underlying said lands above described; that the plaintiffs' said oil and gas leasehold title is hereby quieted as against any and all claims of the defendants, and that the defendants, and all persons claiming by, through or under either or both of them, are hereby restrained and en-

joined from asserting any right, title or interest in or to said lands above described adverse to the said oil and gas leasehold title of the plaintiffs; and that the plaintiffs have judgment against the defendants for plaintiffs' costs herein expended.

To all of the foregoing findings and the judgment of the court the defendants, and each of them except, and their exceptions are allowed.

/s/ C. R. Board, *District Judge.*

Approved as to Form:

/s/ Vincent Dale
Attorney for Plaintiffs

/s/ Tryon, Sweet & Hensley
Attorney for Defendants

Filed July 2, 1962

Recorded in Book 42 of Civ J. Page 367

APPENDIX C

(Attachment 3)

Journal Entry Overruling Motion For New Trial and Allowing Appeal

IN THE DISTRICT COURT IN AND FOR
SAID COUNTY AND STATE

No. 10,597

STATE OF OKLAHOMA,
COUNTY OF TEXAS, SS:

PEERLESS OIL AND GAS COMPANY, a Corporation, JAKE L. HAMON, and WESTHOMA OIL COMPANY, a Corporation,
Plaintiffs,

v.

ERNEST L. CARPENTER and BLANCH M. CARPENTER,
Defendants.

JOURNAL ENTRY OVERRULING MOTION FOR NEW TRIAL AND ALLOWING APPEAL

On this 20th day of June, 1962, there came on for hearing the Motion of the Defendants herein for New Trial, Defendants being present by their attorneys: Robert T. Cornwell of Fleeson, Gooing, Coulson & Kitch; James Yoxall of Light & Yoxall; and L. E. Tryon, Tryon, Sweet & Hensley. The Court having heard the arguments of counsel and being fully advised upon consideration thereof, finds that said Motion for New Trial should be overruled.

IT IS THEREFORE ORDERED AND ADJUDGED that the Motion of the Defendants for a New Trial be and the same is hereby overruled; to which ruling of the Court the Defendants then and there excepted and the exceptions were allowed

by the Court. Thereupon, counsel for Defendants gave notice in open court of their intention to appeal the Judgment made and entered herein on the 13th day of June, 1962, the Order of the Court made and entered herein on the 20th day of June, 1962, overruling Defendants' Motion for New Trial, and all findings, rulings, Orders and Judgments made and entered on the 13th day of June, 1962, and the 20th day of June, 1962, which are contrary to Defendants' interests as reflected in the Court's Journal Entries of said dates; said Appeal being made to the Supreme Court of the State of Oklahoma.

And said Defendants praying an Appeal to the Supreme Court and an extension of time within which to make and serve case-made, IT IS ORDERED that an extension of thirty (30) days from this date be granted said defendants to make and serve case-made, Plaintiffs to have ten (10) days thereafter to suggest amendments, same to be settled on five (5) days' notice in writing by either party.

/s/ C. R. BOARD, *District Judge.*

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TRYON, SWEET & HENSLEY
By /s/ L. E. Tryon
Attorneys for Defendants

DALE & DALE
By /s/ Vincent Dale
Attorneys for Plaintiffs

Filed July 2, 1962

Book 42, Civ J. Page 366-367

APPENDIX D

Opinion of the Court of Appeals Denying Motion to Modify and Correct United States Court of Appeals for the Tenth Circuit.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7042—SEPTEMBER TERM, 1962

Filed United States Court of Appeals, Tenth Circuit

September 11, 1962

OTTO G. LUTES, FLORENCE LUTES, B. B. FRENCH, JEWELL FRENCH, L. O. HOOD, MYRTLE HOOD, D. M. BROWER, MILDRED BROWER, CARL R. STALCUP, MILLIE L. STALCUP, IDA F. WRAY, E. F. BRUCE, GERALDINE BRUCE, J. J. FRENCH, THESIA FRENCH, RIFFE WESLEY, HAZEL RIFFE, OSTBY S. AUSTIN, ETHEL AUSTIN, JESSIE E. BROWN, D. L. HAMILTON, HELEN HAMILTON, HARRY G. RIFFE, MYRTLE RIFFE, G. F. PRICE, FLORA LEE PRICE, LEWIS B. CARPENTER, MARY E. CARPENTER, E. L. CARPENTER AND BLANCHE M. CARPENTER, *Petitioners,*

v.

THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA AND THE HONORABLE STEPHEN S. CHANDLER, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, *Respondents.*

Before PHILLIPS, BREITENSTEIN AND SETH, Circuit Judges.

PER CURIAM.

The respondents have presented a motion for modification of the opinion filed herein. The portions of the opinion

attacked in the motion were based on statements made by counsel for the respondents in open court at the time of the oral argument. The records of state court proceedings submitted in support of the motion all bear dates prior to the date of the argument of this cause and were not then presented to the court nor made a part of the record of this cause. Those state court records neither state nor define the issues presented to or considered by the state court and show no more than the judgment of the state court that the leases had not terminated. The motion for modification of opinion is denied.

APPENDIX E

Summary and History Appending State Court Actions (2 Attachments)

There are presently pending in the State of Oklahoma four quiet title actions involving the proper construction of a "Pugh" Clause in light of a consolidation and unitization of oil properties covered by the leasehold instrument in which the clauses appears, and in light of assignments of producing horizons below and above sea level. This "Pugh" clause appears in substantially identical form in the state actions and the nineteen pending Federal court cases.[1] It appears within Sec. 9 of the pertinent oil

[1] Lessee is expressly granted the right and privilege (which lessee may exercise at any time either before or after production has been obtained upon this premises or any premises consolidated herewith) to consolidate the leasehold estate, created by the execution and delivery of this lease, or any part or parts thereof, with the mineral leasehold estate or estates or parts thereof in any other lands upon which this lessee shall at the time own valid and subsisting lease or leases, located and situated near the property described herein, provided that any resulting consolidated estate shall not cover and include more than 2560 acres. Any consolidation of estates herein authorized shall be consummated when the owner of the leasehold estate created hereby shall have executed and filed for record in the office of the County Clerk of the county or counties in which the same or any part thereof is located, a statement designating and describing such properties so consolidated and declaring lessee's intention to consolidate same, and in the event of any such consolidation, it is agreed:

(a) This lease shall thereafter continue in full force and effect for all purposes as to the premises covered hereby and included in any such consolidation of estates, so long as gas is or can be produced from any well located on any part of the land included in such consolidation (whether on lands covered hereby or not), except as herein otherwise provided, or so long as oil is or can be produced from any well drilled on a portion of the land covered hereby.

(b) During the primary term hereof and until production has been obtained, from this or the consolidated leasehold, the lessee

and gas mining lease which is attached to the complaint in *Otto Lutes* v. *Westhoma Oil Company*, Civil Action No. 9410 in the Federal District Court. (See first attachment to Petition for Writ of Mandamus in the United States Court of Appeals for the 10th Circuit (R. p.). The "Pugh" clause also appears, in *identical* form, in Sec. 9 of the oil and gas mining lease attached to the petitions filed in the District Court for Texas County, Oklahoma, styled *Westhoma Oil Co.* v. *B. C. Rist*, Civil No. 10596; and *Peerless Oil and Gas Co.* v. *Ernest L. Carpenter*, Civil No. 10597. (See Appendix E, Attachs. 1, 2 immediately following this Summary).

Two of the actions were filed in the District Court of Texas County, Oklahoma on September 14, 1961. Specifically, they were *Westhoma Oil Co.* v. *B. C. Rist and Gladys E. Rist*, Civil No. 10596; and *Peerless Oil & Gas Co. et al* v. *Ernest L. Carpenter and Blanche M. Carpenter*, No. 10597. (See Appendix E, Attach, 2 *infra.*). Subsequently, two additional actions were brought in the same State District Court, one of these actions involved identical parties, identical lease provisions and identical land as was involved in one of the nineteen actions pending in federal court. These latter cases were filed October 12, 1961.[2] The first two state court actions were tried in the District

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shall be privileged to pay the annual delay rentals stipulated herein on any part of this leasehold included in a consolidation of estates or not so included, and thereby continue this lease in full force and effect as to the part or portions thereof upon which rentals are so paid, but this lease, insofar as it covers any tract or tracts not included in a consolidation of estates held in force by production as herein provided, shall terminate at the expiration of the primary term hereof, unless oil, gas, or other minerals is or can be produced from a well or wells thereon.

[2] *It will be noted that all four state court actions were brought before the first consolidation order entered by the Federal District Court on October 18, 1961.* This order consolidated actions 9409, 9410, 9411, 9412, 9413, 9414, 9415, 9419, 9421, 9431, 9435, 9446, 9448, and 9453.

Court of Texas County, Oklahoma, upon a stipulation of facts. The two actions were tried on March 22, 1962 and the court rendered judgment therein for Plaintiff *Westhoma Oil Co.*, which was later filed on July 22, 1962. Defendants in both actions filed motions for a new trial. The motions were denied on June 20, 1962. At the hearing on the motions Defendants gave notice of their intention being duly noted and leave being specifically granted in the journal entry overruling the motions for a new trial, filed in both cases on July 2, 1962. (See Appendix C, Attach. 1 and Appendix C, Attach. 2 respectively; R. p. .) The appeals of these two cases were duly filed in the Supreme Court of Oklahoma on August 27, 1962 and are presently awaiting argument (Docket No. 40226, *Rist* case; 40227, *Carpenter* case).

The second pair of state court actions have not yet been tried. By stipulation between opposing counsel it was agreed that these two cases will await the outcome of the other state and Federal litigation. If the Federal action involving the same parties, same lease and same land as the untried state actions is finally decided by an unappealable judgment before the first two state court cases are finally decided by a state court of last resort, the prior Federal decision, according to the stipulation, is to be controlling.

APPENDIX E (ATTACHMENT 1)

Petition and Answer in Westhoma Oil Co. v. B. C. Rist and Gladys E. Rist, No. 10596 (District Court, Texas County, Oklahoma)

IN THE DISTRICT COURT WITHIN AND FOR
TEXAS COUNTY OKLAHOMA

No. 10596

WESTHOMA OIL COMPANY, a corporation, *Plaintiff*,

v.

B. C. RIST AND GLADYS E. RIST, *Defendants*.

PETITION

Comes now the plaintiff above named and, for its cause of action against the defendants above named, alleges and states:

1. Plaintiff is a corporation organized under the laws of the State of Delaware, has its principal place of business in San Antonio, Texas, and at all times herein referred to has been duly authorized to do business in the State of Oklahoma. The defendants are citizens and residents of the State of Oklahoma, residing in Texas County, Oklahoma.

2. On January 8, 1943, the defendant, B. C. Rist, who then was the owner in fee simple of the following described property situated in Texas County, Oklahoma, to wit:

> The Southeast Quarter (SE/4) of Section 2,
> Township 5 North, Range 18 ECM,

joined by his wife, the defendant, Gladys E. Rist, executed and delivered unto Peerless Oil and Gas Company, a corporation, an oil and gas lease covering said land above described and other lands. A true copy of said Oil and Gas Lease is attached hereto as Exhibit "A", and is hereby made a part hereof.

3. Thereafter, on May 31, 1945, the Oklahoma Corporation Commisson, pursuant to the applicable statute, issued its order No. 17867, establishing drilling and spacing units of 640 acres each for the development and production of natural gas from the Guymon-Hugoton Pool, a common source of supply of natural gas underlying an area in Texas County, Oklahoma, at a depth wholly above sea level. Said Section 2 constitutes one of such drilling and spacing units so established by said order.

4. Thereafter, on November 28, 1947, the said Peerless Oil and Gas Company duly assigned said oil and gas lease, in so far as the same covered and affected the said Southeast Quarter (SE/4) of said Section 2, to certain individuals, and on December 15, 1947, said individuals duly assigned said oil and gas lease to plaintiff, in so far as the same covered and affected the said Southeast Quarter (SE/4 of said Section 2, "to the extent of the producing horizons which are situated below, and only below, sea level". A true copy of said assignment to plaintiff is attached hereto as Exhibit "B", and is hereby made a part hereof.

5. Thereafter, on December 27, 1950, said individuals duly assigned unto Hugoton Plains Gas and Oil Company, a corporation, all of their remaining interest in and to said oil and gas lease, which said remaining interest was limited to those horizons situated above sea level and underlying the said Southeast Quarter (SE/4) of Section 2.

6. Thereafter, on January 22, 1961, the said Hugoton Plains Gas and Oil Company, being then the owner also of oil and gas leases covering the North Half (N/2) and the Southwest Quarter (SW/4) of said Section 2, executed a "Declaration of Consolidation of Oil and Gas Leases", pursuant to authority granted in all of the said oil and gas leases covering all of said Section 2, thereby consolidating and unitizing all of said leases into a single unit consisting of all of said Section 2. Said instrument thereafter was

filed for record on February 5, 1951, by the said Hugoton Plains Gas and Oil Company in the office of the County Clerk of Texas County, Oklahoma. A true copy of said instrument is attached hereto as Exhibit "C", and is hereby made a part hereof.

7. On January 30, 1951, the said Hugoton Plains Gas and Oil Company drilled and completed a producing gas well in said Guymon-Hugoton Pool at a depth wholly above sea level and at a lawful location in the Northwest Quarter (NW/4) of said Section 2. On said date all of said oil and gas leases covering all of said Section 2 were in full force and effect due to the timely and proper payment of all accrued drilling delay rentals provided for by said leases. Said well, upon completion, produced natural gas in paying quantities, and has continued at all times thereafter to produce, and presently produces, natural gas in paying quantities. Defendants have been paid their proper proportionate share of the royalty due to them upon such production.

8. By reason of all the foregoing said oil and gas lease, Exhibit "A" hereto, has remained, and presently continues, in full force and effect on the said Southeast Quarter (SE/4) of said Section 2 as to all depths, horizons and strata therein and thereunder, both above and below sea level. Notwithstanding the foregoing, the defendants claim that said oil and gas lease has terminated, and no longer is of any force or effect, as to all depths, horizons and strata below sea level. Said claim by the defendants constitutes a cloud upon the said oil and gas leasehold title of the plaintiff to all depths, horizons and strata below sea level underlying said Southeast Quarter (SE/4) of said Section 2. Said Claim is unfounded and without right, and plaintiff has no adequate remedy at law.

Wherefore, plaintiff prays that it have judgment against the defendants decreeing that said oil and gas lease is valid and subsisting as to all depths, horizons and strata, both

above and below sea level, adjudging plaintiff to be owner thereof as to all depths, horizons and strata below sea level, quieting and confining plaintiff's title thereto, and barring and enjoining the defendants and all persons claiming under them from asserting any claim or interest adverse to plaintiff's said oil and gas leasehold title, for plaintiff's costs herein expended, and for all other and further relief to which plaintiff in equity and good conscience may be entitled.

COCHRAN, DUDLEY, FOWLER, RUCKS, BAKER & JOPLING

By

RICHARD W. FOWLER
1133 First National Building
Oklahoma City 2, Oklahoma
Attorneys for Plaintiff

OIL AND GAS MINING LEASE

THIS AGREEMENT entered into this 8th day of January, 1943 by and between B. C. Rist and wife, Gladys E. Rist the undersigned, hereinafter called Lessor, whether one or more, and PEERLESS OIL AND GAS COMPANY, the undersigned, hereinafter called Lessee,

WITNESSETH:

1. That lessor for and in consideration of the sum of One and No/100 Dollars, ($1.00) in hand paid, and of the covenants and agreements hereinafter contained, to be performed by lessee, have this day granted and leased, and hereby grant and lease and let unto the lessee for the purpose of mining and operating for, and producing oil, gas and casinghead gas and gasoline from the hereinafter described premises, laying pipe lines, building tanks, storing oil, building power stations, rigs, derricks, slush pits, operating boilers, engines, stations, telephone lines and other

structures an appliances to produce, transport, save take care of and manufacture any and/or all such substances and for housing and boarding employees, the following described property situated in the State of Oklahoma, County of Texas, to-wit:

* * * * * * * * * * *

9. Lessee is expressly granted the right and privilege (which lessee may exercise at any time either before or after production has been obtained upon this premises or any premises consolidated herewith) to consolidate the leasehold estate, created by the execution and delivery of this lease, or any part or parts thereof, with the mineral leasehold estate or estates or parts thereof in any other lands upon which this lessee shall at the time own valid and subsisting lease or leases, located and situated near the property described herein, provided that any resulting consolidated estate shall not cover and include more than 2560 acres. Any consolidation of estates herein authorized shall be consummated when the owner of the leasehold estate created hereby shall have executed and filed for record in the office of the County Clerk of the county or counties in which the same or any part thereof is located, a statement designating and describing such properties so consolidated and declaring lessee's intention to consolidate same, and in the event of any such consolidation, it is agreed:

(a) This lease shall thereafter continue in full force and effect for all purposes as to the premises covered hereby and included in any such consolidation of estates, so long as gas is or can be produced from any well located on any part of the land included in such consolidation (whether on lands covered hereby or not), except as herein otherwise provided, or so long as oil is or can be produced from any well drilled on a portion of the land covered hereby.

(b) During the primary term hereof and until production has been obtained from this or the consolidated leasehold, the lessee shall be privileged to pay the annual delay rentals stipulated herein on any part of this leasehold included in a consolidation of estates or not so included, and thereby continue this lease in full force and effect as to the part or portions thereof upon which rentals are so paid, but this lease, insofar as it covers any tract or tracts not included in a consolidation of estates held in force by production as herein provided, shall terminate at the expiration of the primary term hereof, unless oil, gas, or other minerals is or can be produced from a well or wells thereon.

IN WITNESS WHEREOF, We sign the day and year first above written.

B. C. RIST
GLADYS E. RIST

ASSIGNMENT OF OIL AND GAS LEASES

KNOW ALL MEN BY THESE PRESENTS:

That Vernon Taylor Jr., of Bexar County, Texas, Ruth Taylor Campbell, of Montgomery County, Alabama, The Sara H. Taylor Trust (Vernon F. Taylor Trustee thereof), and The James C. Taylor Trust (Vernon F. Taylor Trustee thereof) hereinafter called assignors, in consideration of Ten ($10.00) Dollars and other good and valuable consideration to them passing, the receipt of which is hereby acknowledged, do hereby transfer, assign and convey unto Westhoma Oil Company, a corporation, duly incorporated and existing under the laws of the State of Delaware and having authority to do business both in the State of Oklahoma and in the State of Kansas, hereinafter called assignee, all of the assignors' right, title and interest in and to the oil and gas leases insofar as they cover the herein-

after described lands to the extent of the producing horizons which are situated *below, and only below,* sea leval. Said leases are described below by reference to the dates thereof, name of lessors, name of lessees, county and state in which the property is located, description of the land, and the book and page of the recording thereof, respectively, as follows, to-wit:

REVENUE STAMPS $1.50 affixed.

TEXAS COUNTY, OKLAHOMA

OKL-27 Date: January 8, 1943

Lessor: B. C. Rist and wife, Gladys E. Rist

Lessee: Peerless Oil & Gas Company

Description: SE/4 Section 2-5N-18ECM

Recorded: Book 233, Page 270

Expiration: January 8, 1953
Acreage: 160 Acres

(Together with other leases)

and being leasehold interests heretofore transferred and assigned to the assignors by Peerless Oil & Gas Company.

This transfer and assignment, however, is pursuant to the terms and provisions as set forth in a written agreement between Peerless Oil & Gas Company and these assignors dated September 20, 1944

To have and to hold the same unto the said assignee, its successors and assigns, according to the terms and conditions of said leases.

The effective date of this instrument is January 1, 1948, at seven o'clock A.M.

Witness the hands of the assignors, this 15th day of December, 1947.

VERNON TAYLOR, JR.
Vernon Taylor, Jr.

RUTH TAYLOR CAMPBELL
Ruth Taylor Campbell

VERNON F. TAYLOR
Vernon F. Taylor, as Trustee for
The Sara H. Taylor Trust

VERNON F. TAYLOR
Vernon F. Taylor, as Trustee for
The James C. Taylor Trust

DECLARATION OF CONSOLIDATION
OF OIL AND GAS LEASES

KNOW ALL MEN BY THESE PRESENTS:

THAT Hugoton-Plains Gas and Oil Company, a Corporation, is the owner of the following described valid and subsisting oil and gas leases:

1. From B. C. Rist and wife, Gladys E. Rist, as lessors, to Peerless Oil and Gas Company, lessee, dated January 8, 1943, recorded in Book 233, Page 270, of the records of Texas County, Oklahoma, insofar as said lease covers the following described tract in Texas County, Oklahoma:

> Southeast Quarter (SE¼), Section 2, Township 5 North, Range 18 ECM, containing 160 acres, more or less.

2. From Ernest Woodward and wife, Elsie Woodward, and Alice Rearick, a widow as lessors, to Frank Parkes, lessee, dated June 26, 1944, recorded in Book 252, Page 33, of the records of Texas County, Oklahoma, insofar as said lease covers the following described tract in Texas County, Oklahoma.

Southwest Quarter (SW¼), Section 2, Township 5 North, Range 18 ECM, containing 160 acres, more or less.

3. From Florence R. Duncan, a widow, as lessor, to Peerless Oil and Gas Company, lessee, dated October 18, 1945, recorded in Book 252, Page 104, of the records of Texas County, Oklahoma, and covering the following described tract in Texas County, Oklahoma:

Northwest Quarter (NW¼), Section 2, Township 5 North, Range 18 ECM, containing 160 acres, more or less.

4. From The Commissioners of the Land Office of the State of Oklahoma, acting for and in behalf of the State of Oklahoma, lessor, and Peerless Oil and Gas Company, lessee, dated July 8, 1946, recorded in Book 260, Page 307, of the records of Texas County, Oklahoma, and covering the following described tract in Texas County, Oklahoma:

Lots 1 and 2 and the South Half (S½) of the Northeast Quarter (NE¼), of Section 2, Township 5 North, Range 18 ECM, containing 160 acres, more or less.

Under and by virtue of the provisions of the above described leases, the undesigned is granted the privilege, for the purpose of forming a unit of not to exceed six hundred and forty (640) acres, of consolidating and unitizing each of said leases with any other valid and subsisting oil and gas lease or leases owned by the undersigned.

Now, Therefore, in pursuance of the authority granted the undersigned under and by virtue of the provisions of the above described leases the undersigned hereby consolidates and unitizes the above described leases, insofar as the same cover all of Section 2, Township 5 North, Range 18 ECM, Texas County, Oklahoma, containing six hundred and forty (640) acres, more or less, into a single unit, for the purpose of developing and operating the same for the production of natural gas and/or other minerals.

IN WITNESS WHEREOF, the undersigned has caused the above and foregoing instrument to be executed this 22nd day of January, 1951.

(SEAL) HUGOTON-PLAINS GAS AND OIL COMPANY

By J. SIMM FLUOR
President

ATTEST:
? ? ?
Secretary

IN THE DISTRICT COURT WITHIN AND FOR
TEXAS COUNTY, OKLAHOMA

No. 10,596

WESTHOMA OIL COMPANY, a corporation, *Plaintiff*,

v.

B. C. RIST and GLADYS RIST, *Defendants*.

ANSWER

Come now defendants and for answer to plaintiff's petition allege and state:

1. Defendants deny each and every material allegation of the petition prejudicial to defendants, except those hereinafter specifically admitted.

2. Defendants admit the allegations of paragraphs 1 and 2 of the petition, as amended.

3. Defendants admit the issuance of the Oklahoma Corporation Commission Order No. 17,867, to which reference is made in paragraph 3 of the petition, and which is attached thereto.

4. Defendants admit the execution of Exhibit "B" attached to plaintiff's petition, and the execution of the September 20, 1944 agreement referred to therein, copy of which is attached to the petition.

5. Defendants admit and allege that plaintiff does not now own and has never owned any interest in the leasehold estate created by Exhibit "A" attached to the petition to the extent that it covers that portion of the Southeast Quarter of Section 2, Township 5, North, Range 18 ECM, situated above sea level.

6. Defendants admit and allege that at, from and after the execution of Exhibit "B" attached to the petition, the lease was divided horizontally into two parts, one covering that part of the quarter section consisting of horizons above sea level and one covering that part of the quarter section consisting of horizons below sea level.

7. Defendants admit the execution and recording of Exhibit "C" attached to the petition, and admit and allege that when *Hugoton Plains Oil and Gas Company* executed and filed for record the same, it did not own a valid and subsisting lease covering that part of said quarter section situated below sea level, and deny that that part of the leasehold estate not owned by said company but owned by plaintiff was included in such consolidated leasehold estate.

8. Defendants admit and allege that there has been no production of oil *or gas* from said quarter section. Defendants specifically deny that the leasehold interest claimed by plaintiff, on that part of the land situated below sea level, was ever unitized with any other leasehold estate and deny that there has ever been any unit production of gas with respect thereto.

9. Defendants admit that, during the primary term of the lease, a producing gas well was completed on lands other than the leased premises involved herein and to which plaintiff claims a leasehold interest.

10. Defendants admit that they claim that the said oil and gas lease has terminated, and is no longer of any force or effect as to all horizons, depths and strata below sea level.

WHEREFORE, defendants pray that plaintiff take naught by its action herein and that they have judgment against plaintiff for their costs herein.

FLEESON, GOOING, COULSON & KITCH
Wichita, Kansas

LIGHT & YOXALL
Liberal, Kansas

TRYON, SWEET & HENSLEY
Guymon, Oklahoma

By

Attorneys for Defendants

APPENDIX E (ATTACHMENT 2)

Petition and Answer in Peerless Oil & Gas Co. et al. v. Ernest L. Carpenter and Blanche M. Carpenter, No. 10597 (District Court, Texas County, Oklahoma)

IN THE DISTRICT COURT WITHIN AND FOR
TEXAS COUNTY, OKLAHOMA

No. 10,597

PEERLESS OIL AND GAS COMPANY, a corporation, JAKE L. HAMON, and WESTHOMA OIL COMPANY, a corporation,
Plaintiffs,

v.

ERNEST L. CARPENTER, and BLANCH M. CARPENTER,
Defendants.

PETITION

Come now the Plaintiffs above named and, for their cause of action against the Defendants above named, allege and state:

1. Each of the Plaintiffs, Peerless Oil and Gas Company and Westhoma Oil Company, is a corporation organized under the laws of the State of Delaware, and each of them has its principal place of business in San Antonio, Texas, and at all times herein referred to each of them has been duly authorized to do business in the State of Oklahoma. The Plaintiff, Jake L. Hamon, is a citizen and resident of the State of Texas. The Defendants are citizens and residents of the State of Oklahoma, residing in Texas County, Oklahoma.

2. On January 7, 1943, Louis B. Carpenter and his wife, Mary E. Carpenter, who then were the owners in fee simple of the following described property situated in Texas County, Oklahoma, to wit:

The Northwest Quarter (NW/4) of Section 34, Township 6 North, Range 18 ECM,

executed and delivered to the Plaintiff, Peerless Oil and Gas Company, an oil and gas lease covering said land above described and other lands. A true copy of said oil and gas lease is attached hereto as Exhibit "A", and is hereby made a part hereof. Thereafter the said Lessors, Louis B. Carpenter and Mary E. Carpenter, conveyed the said lands described above by Warranty Deed to the Defendant, Ernest L. Carpenter, whose wife is the Defendant, Blanch M. Carpenter.

3. Thereafter, on May 31, 1945, the Oklahoma Corporation Commission, pursuant to the applicable statute, issued its order No. 17867, establishing drilling and spacing units of 640 acres each for the development and production of natural gas from the Guymon-Hugoton Pool, a common source of supply of natural gas underlying an area in Texas County, Oklahoma, at a depth wholly above sea level. Said Section 34 constitutes one of such drilling and spacing units so established by said order.

4. Thereafter, on November 28, 1947, the said Plaintiff, Peerless Oil and Gas Company, duly assigned said oil and gas lease, in so far as the same covered and affected the said Northwest Quarter of said Section 34, to certain individuals, and on December 15, 1947, said individuals duly assigned said oil and gas lease to the Plaintiff, Westhoma Oil Company, in so far as the same covered and affected the said Northwest Quarter of said Section 34, "to the extent of the producing horizons which are situated below, and only below, sea level". A true copy of said assignment to the Plaintiff, Westhoma Oil Company, is attached hereto as Exhibit "B", and is hereby made a part hereof.

5. On December 15, 1947, said individuals duly assigned unto Plains Natural Gas Company, a corporation, all of their remaining interests in and to said oil and gas lease,

which said remaining interest was limited to those horizons situated above sea level and underlying the said Northwest Quarter of said Section 34.

6. Thereafter, on June 13, 1950, the said Plains Natural Gas Company, being then the owner also of oil and gas leases covering the South Half and the Northeast Quarter of said Section 34, executed a "Declaration of Consolidation of Oil and Gas Leases", pursuant to authority granted in all of the said oil and gas leases covering all of said Section 34. Said instrument thereafter was filed for record on June 30, 1950, by the said Plains Natural Gas Company in the office of the County Clerk of Texas County, Oklahoma. A true copy of said instrument is attached hereto as Exhibit "C", and is hereby made a part hereof.

7. Thereafter, on July 17, 1950, the said Plains Natural Gas Company drilled and completed a producing gas well in said Guymon-Hugoton Pool at a depth wholly above sea level and at a lawful location in the said Northwest Quarter of said Section 34. On said date all of said oil and gas leases covering all of said Section 34 were in full force and effect due to the timely and proper payment of all accrued drilling delay rentals provided for by said leases. Said well, upon completion, produced natural gas in paying quantities and has continued at all times thereafter to produce, and presently produces, natural gas in paying quantities. The Defendant, Ernest L. Carpenter, has been paid his proper proporitonate share of the royalty due to him upon such production.

8. Thereafter, by means assignments, the said interest of the said Plains Natural Gas Company in said oil and gas lease became vested in, and is now owned by, Hugoton Plains Gas and Oil Company, a corporation, and the said interest of the Plaintiff, Westhoma Oil Company, in said oil and gas lease became vested in, and is now owned jointly by the Plaintiffs, Peerless Oil and Gas Company and Jake L. Hamon, subject to an overriding royalty interest

therein which was reserved by the Plaintiff, Westhoma Oil Company.

9. By reason of all the foregoing said oil and gas lease, Exhibit "A" hereto, has remained, and presently continues, in full force and effect on the said Northwest Quarter of said Section 34 as to all depths, horizons and strata therein and thereunder, both above and below sea level. Notwithstanding the foregoing, the Defendants claim that said oil and gas lease has terminated, and no longer is of any force or effect, as to all depths, horizons and strata below sea level. Said claim by the Defendants constitutes a cloud upon the said oil and gas leasehold title of the Plaintiffs to all depths, horizons and strata below sea level underlying said Northwest Quarter of said Section 34. Said claim is unfounded and without right, and Plaintiffs have no adequate remedy at law.

Wherefore, Plaintiffs pray that they have judgment against the Defendants decreeing that said oil and gas lease is valid and subsisting as to all depths, horizons and strata, both above and below sea level, adjudging Plaintiffs to be the owners thereof as to all depths, horizons and strata below sea level, quieting and confirming Plaintiffs' title thereto, and barring and enjoining the Defendants and all persons claiming under them from asserting any claim or interest adverse to Plaintiffs' said oil and gas leasehold title, for Plaintiffs' costs herein expended, and for all other and further relief to which Plaintiffs in equity and good conscience may be entitled.

VINCENT DALE
Guymon, Oklahoma

COCHRAN, DUDLEY, FOWLER, RUCKS, BAKER & JOPLING

By
RICHARD W. FOWLER
1133 First National Building
Oklahoma City 2, Oklahoma

Attorneys for Plaintiff

Oil and Gas Mining Lease

This Agreement entered into this 7th day of January, 1943, by and between Louis B. Carpenter and wife, Mary E. Carpenter the undersigned, hereinafter called Lessor, whether one or more, and Peerless Oil and Gas Company, the undersigned, hereinafter called Lessee,

Witnesseth:

1. That lessor for and in consideration of the sum of One and No/100 Dollars, ($1.00) in hand paid, and of the covenants and agreements hereinafter contained, to be performed by lessee, have this day granted and leased and hereby grant and lease and let unto the lessee for the purpose of mining and operating for, and producing oil, gas and casinghead gas and gasoline from the hereinafter described premises, laying pipe lines, building tanks, storing oil, building power stations, rigs, derricks, slush pits, operating boilers, engines, stations, telephone lines and other structures and appliances to produce, transport, save, take care of and manufacture any and/or all such substances and for housing and boarding employees, the following described property situated in the State of Oklahoma, County of Texas, to-wit:

* * * * * * * * * * *

9. Lessee is expressly granted the right and privilege (which lessee may exercise at any time either before or after production has been obtained upon this premises or any premises consolidated herewith) to consolidate the leasehold estate, created by the execution and delivery of this lease, or any part or parts thereof, with the mineral leasehold estate or estates or parts thereof in any other lands upon which this lessee shall at the time own valid and subsisting lease or leases, located and situated near the property described herein, provided that any resulting consolidated estate shall not cover and include more than 2560 acres. Any consolidation of estates herein authorized shall

be consummated when the owner of the leasehold estate created hereby shall have executed and filed for record in the office of the County Clerk of the county or counties in which the same or any part thereof is located, a statement designating and describing such properties so consolidated and declaring lessee's intention to consolidate same, and in the event of any such consolidation, it is agreed:

(a) This lease shall thereafter continue in full force and effect for all purposes as to the premises covered hereby and included in any such consolidation of estates, so long as gas is or can be produced from any well located on any part of the land included in such consolidation (whether on lands covered hereby or not), except as herein otherwise provided, or so long as oil is or can be produced from any well drilled on a portion of the land covered hereby.

(b) During the primary term hereof and until production has been obtained, from this or the consolidated leasehold, the lessee shall be privileged to pay the annual delay rentals stipulated herein on any part of this leasehold included in a consolidation of estates or not so included, and thereby continue this lease in full force and effect as to the part or portions thereof upon which rentals are so paid; but this lease, insofar as it covers any tract or tracts not included in a consolidation of estates held in force by production as herein provided, shall terminate at the expiration of the primary term hereof, unless oil, gas, or other minerals is or can be produced from a well or wells thereon.

. . . . . .

In Witness Whereof, We sign the day and year first above written.

Louis B. Carpenter
Mary E. Carpenter

ASSIGNMENT OF OIL AND GAS LEASES

KNOW ALL MEN BY THESE PRESENTS:

That Vernon Taylor Jr., of Bexor County, Texas, Ruth Taylor Campbell, of Montgomery County, Alabama, The Sara H. Taylor Trust (Vernon F. Taylor Trustee thereof), and The James C. Taylor Trust (Vernon F. Taylor Trustee thereof) hereinafter called assignors, in consideration of Ten ($10.00) Dollars and other good and valuable consideration to them passing, the receipt of which is hereby acknowledged, do hereby transfer, assign and convey unto Westhoma Oil Company, a corporation, duly incorporated and existing under the laws of the State of Delaware and having authority to do business both in the State of Oklahoma and in the State of Kansas, hereinafter called assignee, all of the assignors' right, title and interest in and to the oil and gas leases insofar as they cover the hereinafter described lands to the extent of the producing horizons which are situated *below, and only below*, sea level. Said leases are described below by reference to the dates thereof, name of lessors, name of lessees, county and state in which the property is located, description of the land, and the book and page of the recording thereof, respectively, as follows, to-wit:

REVENUE STAMPS $1.50 affixed.

TEXAS COUNTY, OKLAHOMA

OKL-80 Date: January 7, 1943

Lessor: Louis B. Carpenter and wife, Mary E. Carpenter

Lessee: Peerless Oil & Gas Company

Description: NW/4 Section 34-6N-18ECM

Recorded: Book 233, Page 322

Expiration: January 7, 1953

Acreage: 160 Acres

(Together with other leases)

and being leasehold interests heretofore transferred and assigned to the assignors by Peerless Oil & Gas Company.

This transfer and assignment, however, is pursuant to the terms and provisions as set forth in a written agreement between Peerless Oil & Gas Company and these assignors dated September 20, 1944.

To have and to hold the same unto the said assignee, its successors and assigns, according to the terms and conditions of said leases.

The effective date of this instrument is January 1, 1948, at seven o'clock A.M.

Witness the hands of the assignors, this 15th day of December, 1947.

VERNON TAYLOR, JR.
Vernon Taylor, Jr.

RUTH TAYLOR CAMPBELL
Ruth Taylor Campbell

VERNON F. TAYLOR
Vernon F. Taylor, as Trustee for
The Sara H. Taylor Trust

VERNON F. TAYLOR
Vernon F. Taylor, as Trustee for
The James C. Taylor Trust

STATE OF TEXAS
COUNTY OF BEXAR

Before me, the undersigned, a Notary Public, in and for said County and State, on this 15th day of December, 1947, personally appeared Vernon Taylor, Jr., and Ruth Taylor Campbell, to me known to be the identical persons who executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein

set forth. Given under my hand and seal the day and year last above written.

FLORENCE COWDRY
Notary Public in and for Bexar County, Texas

Florence Cowdry
Notary Public, Bexar County, Texas

SEAL
My commission expires:
6/1/49

STATE OF TEXAS
COUNTY OF BEXAR

Before me, the undersigned, a Notary Public, in and for said county and state, on this 15th day of December, 1947, personally appeared Vernon F. Taylor, Trustee under The Sara H. Taylor Trust, to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that he executed the same as trustee of said estate as his free and voluntary act and deed for the uses and purposes therein set forth. Given under my hand and seal the day and year last above written.

FLORENCE COWDRY
Notary Public in and for Bexar County, Texas

Florence Cowdry,
Notary Public in and for
Bexar County, Texas

SEAL
My commission expires:
6/1/49

Declaration of Consolidation Of Oil and Gas Leases

Know All Men by These Presents:

That Plains Natural Gas Company, a Corporation, is the owner of the following described valid and subsisting oil and gas leases:

1. From Louis B. Carpenter and wife, Mary E. Carpenter, lessors, to Peerless Oil and Gas Company, lessee, dated January 7, 1943, recorded in Book 233, Page 322 of the records of Texas County, Oklahoma, covering, among other lands, the following described land in Texas County, Oklahoma:

> Northwest quarter of Section 34, Township 6 North, Range 18 ECM, containing 160 acres, more or less.

2. From Otto G. Lutes and Florence Lutes, his wife, lessors, to Peerless Oil and Gas Company, lessee, dated January 8, 1943, recorded in Book 233, Page 296 of the records of Texas County, Oklahoma, covering the following described tract of land in Texas County, Oklahoma:

> Northeast quarter of Section 34, Township 6 North, Range 18 ECM, containing 160 acres, more or less.

3. From Herbert Gilmore and his wife, Laura A. Gilmore, lessors, to Peerless Oil and Gas Company, lessee, dated May 8, 1942, recorded in Book 233, Page 108 of the records of Texas County, Oklahoma, covering, among other lands, the following described land in Texas County, Oklahoma:

> Southeast quarter of Section 34, Township 6 North, Range 18 ECM, containing 160 acres, more or less.

4. From Herman Ewert and wife, Margaret Ewert, lessors, to Peerless Oil and Gas Company, lessee, dated April 2, 1943, recorded in Book 210, Page 220 of the records of Texas County, Oklahoma, covering the following described land in Texas County, Oklahoma:

Southwest quarter of Section 34, Township 6 North, Range 18 ECM, containing 160 acres, more or less.

Under and by virtue of the provisions of the above described leases, the undersigned is granted the privilege, for the purpose of forming a unit of not to exceed six hundred forty (640) acres, of consolidating and unitizing each of said leases with any other valid and subsisting oil and gas lease or leases owned by the undersigned.

Now, Therefore, in pursuance of the authority granted the undersigned under and by virtue of the provisions of the above described leases the undersigned hereby consolidates and unitizes the above described leases, insofar as the same cover all of Section 34, Township 6 North, Range 18 ECM, containing 640 acres, more or less, into a single unit, for the purpose of developing and operating the same for the production of natural gas and/or other minerals.

In Witness, Whereof, the undersigned has caused the above and foregoing instrument to be executed this 13th day of June, 1950.

Plains Natural Gas Company
s/ By: Vernon Taylor, Jr., *President*

(SEAL)
Attest:

s/ W. B. Chapman
Assistant Secretary

IN THE DISTRICT COURT WITHIN AND FOR
TEXAS COUNTY, OKLAHOMA

No. 10,597

PEERLESS OIL AND GAS COMPANY, a corporation, JAKE L. HAMON, and WESTHOMA OIL COMPANY, a corporation,
Plaintiffs,

vs.

ERNEST L. CARPENTER and BLANCH M. CARPENTER,
Defendants.

ANSWER

Come now defendants and for answer to plaintiffs' petition allege and state:

1. Defendants deny each and every material allegation of the petition prejudicial to defendants, except those hereinafter specifically admitted.

2. Defendants admit the allegations of paragraphs 1 and 2 of the petition, as amended.

3. Defendants admit the issuance of the Oklahoma Corporation Commission Order No. 17,867, to which reference is made in paragraph 3 of the petition, and which is attached thereto.

4. Defendants admit the execution of Exhibit "B" attached to plaintiffs' petition, and the execution of the September 20, 1944 agreement referred to therein, copy of which is attached to the petition.

5. Defendants admit and allege that plaintiffs do not now own and have never owned any interest in the leasehold estate created by Exhibit "A" attached to the petition to the extent that it covers that portion of the Northwest Quarter of Section 34, Township 6 North, Range 18 ECM, situated above sea level.

6. Defendants admit and allege that at, from and after the execution of Exhibit "B" attached to the petition, the lease was divided horizontally into two parts, one covering that part of the quarter section consisting of horizons above

sea level and one covering that part of the quarter section consisting of horizons below sea level.

7. Defendants admit the execution and recording of Exhibit "C" attached to the petition, and admit and allege that when Plains Natural Gas Company executed and filed for record the same, it did not own a valid and subsisting lease covering that part of said quarter section situated below sea level, and deny that that part of the leasehold estate not owned by said company but owned by plaintiffs was included in such consolidated leasehold estate.

8. Defendants admit and allege that there has been no production of oil from said quarter section. Defendants specifically deny that the leasehold interest claimed by plaintiffs, on that part of the land situated below sea level, was ever unitized with any other leasehold estate and deny that there has ever been any unit production of gas with respect thereto.

9. Defendants admit that, during the primary term of the lease, a producing gas well was completed on lands other than the leased premises involved herein and to which plaintiffs claim a leasehold interest.

10. Defendants admit that they claim that the said oil and gas lease has terminated, and is no longer of any force or effect as to all horizons, depths and strata below sea level.

WHEREFORE, defendants pray that plaintiffs take naught by its action herein and that they have judgment against plaintiffs for their costs herein.

FLEESON, GOOING, COULSON & KITCH
Wichita, Kansas

LIGHT & YOXALL
Liberal, Kansas

TRYON, SWEET & HENSLEY
Guymon, Oklahoma

By

Attorneys for Defendants